

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE

v.

NIGEL DAVIS

Defendant.

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CRIMINAL ACTION NUMBERS

IN-04-04-0374 & 05-04-2119

ID No. 0403021957 & 0504003393

Submitted: February 28, 2011

Decided: May 20, 2011

MEMORANDUM OPINION

*Upon Motion of Defendant for Postconviction Relief - **DENIED***

HERLIHY, Judge

Defendant Nigel Davis has moved for postconviction relief in the above captioned case. He pled guilty on October 27, 2005 to the charge of possession with intent to deliver cocaine. He was sentenced the same day. He did not file an appeal. Thus, his conviction became final thirty days later.¹

His claims are several, primarily ineffective assistance of his counsel for not informing him of the consequences of that plea. The main consequence to him is that he will be deported/excluded from the United States. Trial counsel, when supplied with the motion, had no specific recollection of advising Davis of the immigration consequences of his plea, but says he routinely does so with non-U.S. citizens as a matter of course.

Before the Court can undertake a review of a postconviction relief motion, it must determine if there are any procedural bars to doing so.² There are several. The first is that his motion is time barred. It was filed December 17, 2010, more than five years after his conviction became final.³ There are two means of relief from this time bar. One is when a defendant asserts “a retroactively applicable right this newly recognized after” the conviction becomes final.⁴

¹ *Jackson v. State*, 654 A.2d 829, 832 (Del. 1995).

² *Young v. State*, 812 A.2d 225 (Del. 2002)(TABLE).

³ Superior Ct. Cr. R. 61(i)(1); *Jackson v. State*, *supra*.

⁴ Superior Ct. Cr. R. 61(i)(1).

Davis' claim is, in effect, that the United States Supreme Court case in *Padilla v. Kentucky*, decided in 2010, established a new right applicable to him: that it is ineffective assistance of counsel if an attorney fails to inform a defendant of the risk of deportation/exclusion.⁵ The trouble is *Padilla* did not hold that its ruling establishes a retroactive right.

For purposes of this opinion only, this Court will assume it is to be retroactively applied as a newly recognized right. But that assumption still does not help Davis. In *Padilla*, the Supreme Court remanded the case to determine whether Padilla could show prejudice.⁶ That was needed because on a claim of ineffective assistance of counsel, a defendant must demonstrate 1) the attorney's conduct fell below an objective standard of reasonableness and 2) but for counsel's conduct, he or she was prejudiced.⁷

Counsel's affidavit in this case is uncertain whether he gave that advice. This Court will assume for purposes of discussion, and to give Davis the benefit of the doubt, that his counsel did not advise him of his risk of deportation/exclusion.⁸ Because the Court concedes for purposes of this argument Davis met the first prong, he, like Padilla, must still show he met the second prong.

⁵ 130 S.Ct. 1473 (2010).

⁶ *Padilla*, 130 S.Ct. at 1487.

⁷ *Ayres v. State*, 802 A.2d 278, 281 (Del. 2002).

⁸ It is imperative in light of *Padilla*, that counsel make an exact record of this advice in each applicable case.

He cannot meet the prejudice test. Davis' history in this Court shows why. On October 24, 2004, he pled guilty to another charge of possession with intent to deliver cocaine (Case No. 0403021957, Cr. A. No. IN-04-04-0374). He signed a TIS Guilty Plea form indicating he was aware the conviction could lead to his deportation/exclusion. He was sentenced that day receiving a four year sentence suspended after six months. That conviction was not appealed.

Davis, however, in 2009, filed in that case a motion for postconviction relief (titled Motion to Vacate) making essentially the same claim that his counsel in that case did not inform him of the deportation/exclusion consequences.⁹ On June 30, 2010, this Court denied Davis' motion. That denial was not appealed.

As noted above, Davis filed in late 2010 the current motion for this case. As with the earlier case, he signed a TIS Guilty Plea form again indicating he was aware of the deportation/exclusion risks. He is bound by that statement as he was in August 2004 when he signed the prior TIS Guilty Plea form.¹⁰ And he knew in 2009 of the ICE deportation order.

⁹ It should be noted that attached to his current motion is a 2009 ICE deportation notice.

¹⁰ *Sommerville v. State*, 703 A.2d 629, 632 (Del. 1997).

This Court decided in 1994 that counsel was not ineffective for failing to advise a defendant of the risk of deportation/exclusion.¹¹ But at the same time, anticipating that such a consequence which an affected defendant should know, this Court noted it would be adding to its English and Spanish language TIS Guilty Plea forms language about the risk of deportation.¹² This addition was met with approval in the Supreme Court's affirmance.¹³ The language has been in the Courts forms since 1994.

So long before *Padilla*, this Court put such language in its TIS Guilty Plea forms. One reason was that counsel may have forgotten to so advise, or may have had no inkling there was a need to advise. Since each defendant had to read and sign those forms, each would know in case counsel failed to advise. Further, unless something arises during the plea colloquy to alert the Court to the need to verbally raise the subject, it would be in the form the defendant signed and read, and which the attorney had read to him or her.

Davis was made explicitly aware of the deportation/exclusion risk on two occasions. Once about a year prior to his plea in 2005. There seems no basis to overcome the time bar of Rule 61(i)(1). Nor does any provision of Rule 61(i)(5) apply to provide relief to Davis which would be his second possible means of relief to that time bar.

¹¹ *State v. Christie*, 655 A.2d 836, 840 (Del. Super. 1994), aff'd *Christie v. State*, 655 A.2d 306 (Del. 1995)(TABLE).

¹² *State v. Christie*, 655 A.2d at 838, fn. 1.

¹³ *Christie v. State*, *Supra*.

In this Court's denial of Davis' earlier motion, both this and the earlier case were cited in the heading. This raises the second bar to this motion. It is duplicative and previously adjudicated.¹⁴ No relief from these bars is applicable.

Conclusion

For the reasons stated herein, defendant Nigel Davis' motion for postconviction relief is **DENIED**.

IT IS SO ORDERED.

J.

¹⁴ Superior Ct. Cr. R. 61(i)(2) and (4).